



NATIONAL FOUNDATION FOR THE ARTS AND HUMANITIES

National Endowment for the Arts

45 CFR Parts 1149 and 1158

RIN 3135-AA33

Federal Civil Penalties Adjustments

AGENCY: National Endowment for the Arts, National Foundation for the Arts And Humanities

ACTION: Final rule.

SUMMARY: The National Endowment for the Arts (NEA) is adjusting the maximum civil monetary penalties that may be imposed for violations of the Program Fraud Civil Remedies Act (PFCRA) and the NEA's Restrictions on Lobbying to reflect the requirements of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act). The 2015 Act further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (the Inflation Adjustment Act) to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. This final rule finalizes the catch-up inflation adjustment interim final rule required by the Inflation Adjustment Act.

DATES: *Effective date:* This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Aswathi Zachariah, Assistant General Counsel, National Endowment for the Arts, 400 7th St., SW, Washington, DC 20506, Telephone: 202-682-5418.

SUPPLEMENTARY INFORMATION:

1. Background

On June 15, 2017 the NEA issued an interim final rule entitled “Implementing the Federal Civil Penalties Adjustment Act Improvements Act of 2015” (the IFR) to implement the required catch-up and annual adjustments to the NEA’s civil monetary penalties. (*See* 82 FR 27431) This rule finalizes the catch-up adjustment interim final rule and outlines the required annual adjustment of civil penalties in accordance with the 2015 Act, as amended.

2. Overview of Final Rule

The 2015 Act requires agencies to: (1) Adjust the level of civil monetary penalties with an initial “catch-up” adjustment through an interim final rulemaking; and (2) make subsequent annual adjustments for inflation. Inflation adjustments will be based on the percent change in the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October preceding the date of the adjustment, relative to the October CPI-U in the year of the previous adjustment.

The Office of Management and Budget has issued two memoranda, providing guidance on implementing and calculating adjustments.¹

In the IFR, the NEA identified two civil penalties in its regulations that require adjustment: (1) the penalty associated with Restrictions on Lobbying (45 CFR 1158.400; 45 CFR part 1158, app. A) and (2) the penalty associated with the Program Fraud Civil Remedies Act (45 CFR 1149.9). The NEA received no comments in response to the IFR and the proposed adjustments and therefore will continue to publish subsequent annual adjustments in accordance with the law or as directed by the Office of Management and Budget.

¹ OMB Memoranda M-16-06 and M-17-11.

3. Subsequent Annual Adjustments

The 2015 Act requires agencies to make annual adjustments to civil penalty amounts no later than January 15 of each year following the adjustments contained in this final rule. For subsequent annual adjustments made in accordance with the 2015 Act, the amount of the adjustment will have the same basis as the annual adjustments previously described in the IFR (the percent increase between the CPI-U for the month of October preceding the date of the adjustment and the CPI-U for the October one year prior to the October immediately preceding the date of the adjustment). If there is no increase, there is no adjustment of civil penalties. Therefore, if the NEA adjusts penalties in January 2018, the adjustment will be calculated based on the percent change between the CPI-U for October 2017 (the October immediately preceding the date of adjustment) and October 2016 (the October one year prior to October 2017). The NEA will publish the amount of these annual inflation adjustments in the Federal Register no later than January 15 of each year.

4. Compliance

Administrative Procedure Act

Section 553 of the Administrative Procedure Act requires agencies to provide an opportunity for notice and comment on rulemaking and also requires agencies to delay a rule's effective date for 30 days following the date of publication in the Federal Register unless an agency finds good cause to forgo these requirements. However, section 4(b)(2) of the 2015 Act requires agencies to adjust civil monetary penalties notwithstanding section 553 of the Administrative Procedure Act (APA) and publish annual inflation adjustments in the Federal Register. "This means that the public procedure the APA generally requires . . . is not required

for agencies to issue regulations implementing the annual adjustment.” OMB Memorandum M-17-11.

Even if the 2015 Act did not except this rulemaking from section 553 of the APA, the NEA has good cause to dispense with notice and comment. Section 553(b)(B), authorizes agencies to dispense with notice and comment procedures for rulemaking if the agency finds good cause that notice and comment are impracticable, unnecessary, or contrary to public interest. The annual adjustments to civil penalties for inflation and the method of calculating those adjustments are established by section 5 of the FCPIAA, as amended, leaving no discretion for the NEA. Accordingly, public comment would be impracticable because the NEA would be unable to consider such comments in the rulemaking process.

Regulatory Planning and Review (Executive Order 12866)

Executive Order 12866 (E.O. 12866) established a process for review of rules by the Office of Information and Regulatory Affairs, which is within the Office of Management and Budget (OMB). Only “significant” proposed and final rules are subject to review under this Executive Order. “Significant,” as used in E.O. 12866, means “economically significant.” It refers to rules with (1) an impact on the economy of \$100 million; or that (2) were inconsistent or interfered with an action taken or planned by another agency; (3) materially altered the budgetary impact of entitlements, grants, user fees, or loan programs; or (4) raised novel legal or policy issues.

This final rule would not be a significant policy change and OMB has not reviewed this final rule under E.O. 12866. We have made the assessments required by E.O. 12866 and determined that this rule: (1) will not have an effect of \$100 million or more on the economy; (2)

will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (3) will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (4) does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients; and (5) does not raise novel legal or policy issues.

Executive Order 13771

Executive Order 13771 section 5 requires that agencies, in most circumstances, remove or rescind two regulations for every regulation promulgated unless they request and are specifically exempted from that order's requirements by the Director of the Office of Management and Budget.

This rule is not subject to the requirements of Executive Order 13771 because this rule is not significant under Executive Order 12866. Furthermore, the NEA has requested and has received an exemption from the requirement that the agency rescind two regulations for every regulation it promulgate from the Director of the Office of Management and Budget.

Federalism (Executive Order 13132)

This rulemaking does not have Federalism implications, as set forth in E.O. 13132. As used in this order, Federalism implications mean "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." The NEA has determined that this rulemaking will not have Federalism implications within the meaning of E.O. 13132.

Civil Justice Reform (Executive Order 12988)

This rulemaking meets the applicable standards set forth in section 3(a) and 3(b)(2) of E.O. 12988. Specifically, this final rule is written in clear language designed to help reduce litigation.

Indian Tribal Governments (Executive Order 13175)

Under the criteria in E.O. 13175, we have evaluated this final rule and determined that it would have no potential effects on Federally recognized Indian Tribes.

Takings (Executive Order 12630)

Under the criteria in E.O. 12630, this rulemaking does not have significant takings implications. Therefore, a takings implication assessment is not required.

Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b))

This rulemaking will not have a significant adverse impact on a substantial number of small entities, including small businesses, small governmental jurisdictions, or certain small not-for-profit organizations.

Paperwork Reduction Act of 1995 (44 U.S.C., Chapter 35)

This rulemaking will not impose any “information collection” requirements under the Paperwork Reduction Act. Under the act, information collection means the obtaining or disclosure of facts or opinions by or for an agency by 10 or more nonfederal persons.

Unfunded Mandates Act of 1995 (Section 202, Pub. L. 104–4)

This rulemaking does not contain a Federal mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year.

National Environmental Policy Act of 1969 (5 U.S.C. 804)

The final rule will not have significant effect on the human environment.

Small Business Regulatory Enforcement Fairness Act of 1996 (Sec. 804, Pub. L. 104-121)

This final rule would not be a major rule as defined in section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This final rule will not result in an annual effect on the economy of \$100,000,000 or more, a major increase in costs or prices, significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign based companies in domestic and export markets.

E-Government Act of 2002 (44 U.S.C. 3504)

Section 206 of the E-Government Act requires agencies, to the extent practicable, to ensure that all information about that agency required to be published in the Federal Register is also published on a publicly accessible website. All information about the NEA required to be published in the Federal Register may be accessed at www.arts.gov. This Act also requires agencies to accept public comments on their rules “by electronic means.” See heading “Public Participation” for directions on electronic submission of public comments on this final rule.

Finally, the E-Government Act requires, to the extent practicable, that agencies ensure that a publicly accessible Federal Government website contains electronic dockets for rulemakings under the Administrative Procedure Act of 1946 (5 U.S.C. 551 *et seq.*). Under this Act, an electronic docket consists of all submissions under section 553(c) of title 5, United States Code; and all other materials that by agency rule or practice are included in the rulemaking docket under section 553(c) of title 5, United States Code, whether or not submitted

electronically. The website <https://www.regulations.gov> contains electronic dockets for the NEA's rulemakings under the Administrative Procedure Act of 1946.

Plain Writing Act of 2010 (5 U.S.C. 301)

Under this Act, the term “plain writing” means writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience. To ensure that this rule has been written in plain and clear language so that it can be used and understood by the public, the NEA has modeled the language of this rule on the Federal Plain Language Guidelines.

Public Participation

The NEA has written this final rule in compliance with E.O. 13563 by ensuring its accessibility, consistency, simplicity of language, and overall comprehensibility. In addition, the public participation goals of this order are also satisfied by the NEA's participation in a process in which its views and information are made public to the extent feasible, and before any decisions are actually made. This will allow the public the opportunity to react to the comments, arguments, and information of others during the rulemaking process. The NEA initiates its participation in an open exchange by posting the regulation and its rulemaking docket on <https://www.regulations.gov>.

Finally, Section 2 of E.O. 13563 directs agencies, where feasible and appropriate, to seek the views of those who are likely to be affected by rulemaking. This provision emphasizes the importance of prior consultation with “those who are likely to benefit from and those who are potentially subject to such rulemaking.” One goal is to solicit ideas about alternatives, relevant

costs and benefits (both quantitative and qualitative), and potential flexibilities. The NEA reaches out to interested and affected parties by soliciting comments.

List of Subjects in 45 CFR Parts 1149 and 1158

Administrative practice and procedure, Government contracts, Grant programs, Loan programs, Lobbying, Penalties.

For the reasons stated in the preamble, the interim rule amending 45 CFR parts 1149 and 1158 which was published at 82 FR 27431 on June 15, 2017 is adopted as final without change.

Dated: December 7, 2017.

Jillian Miller,

Director of Guidelines and Panel Operations,

Administrative Services,

National Endowment for the Arts.

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